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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 57

LOCAL NO. 508, CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

Petitioner,

vs.

E. [illegible] C. D. MACKNIGHT, JR., E. G. [illegible] AND J. E. [illegible], d/b/a S. J. [illegible] COMPANY, Partnership,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF IN SUPPORT OF BRIEF OF PETITIONER IN CERTIORARI

[illegible]
[illegible]
ATTORNEYS FOR PETITIONER.

[illegible]
[illegible]
[illegible]

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87

LOCAL NO. 438, CONSTRUCTION & GENERAL LABORERS' UNION, AFL-CIO,

Petitioner,

VS.

S. J. CURRY, C. D. McKNIGHT, JR., E. G. HIGHTOWER AND J. S. TAPPAN, d/b/a S. J. CURRY & COMPANY, a Partnership,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF IN REPLY TO BRIEF OF DEFENDANT IN CERTIORARI

The Reply Brief of Defendant in Certiorari, so far as the merits of the case are concerned, is almost en-

tirely based upon the position that the Courts of the State of Georgia have jurisdiction of this cause because the Georgia Right To Work Law is involved.

It is respectfully submitted that said position is without merit for the following reasons:

(1) If the actions alleged are either protected by or in violation of the National Labor Relations Act they would be preempted even if the State Right to Work Law had been violated.

(2) The evidence in this cause establishes beyond question that the State Right To Work Laws were in no way violated in this case.

THE SUBJECT MATTER OF THE CAUSE WOULD HAVE BEEN PREEMPTED EVEN IF THE GEORGIA RIGHT TO WORK LAW HAD BEEN VIOLATED

In support of this position Defendant in Certiorari cites several cases.[1]

The *Algoma Plywood* case was expressly repudiated by this Court in the case of *Building Trades Council*

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[1] *Algoma Plywood and Veneer Company vs. WERB*, 336 U.S. 301, 69 Sup. Ct. 584; *United Association of Journeymen, Plumbers and Steamfitters vs. Graham*, 345 U.S. 192, 73 Sup. Ct. 585; *Building Service Employees International Union vs. Gazzam*, 339 U.S. 532, 70 Sup. Ct. 784; *International Brotherhood of Teamsters vs. Hanke*, 339 U.S. 470, 70 Sup. Ct. 773; *International Brotherhood of Teamsters vs. Vogt, Inc.*, 354 U.S. 284, 77 Sup. Ct. 1166.

vs. Garman, 359 U.S. 236, 79 Sup. Ct. 773, in which the Court said:

> "The approach taken in that case in which the court undertook for itself to determine the status of the disputed activity has not been followed in later decisions and is no longer of general application."

None of the other cases cited by Respondent involved in any way the question of jurisdiction. It does not appear in said cases that it was shown that the employers were engaged in interstate commerce within the meaning of the National Labor Relations Act, and the question of jurisdiction was in no way raised or decided by the Court. All of said cases involved the single question of whether or not the State action deprived the Union of freedom of speech in violation of the Fourteenth Amendment to the United States Constitution. In the case at bar, this Court granted certiorari not on the issue of whether or not there was a violation of the Fourteenth Amendment but whether or not the State Court had jurisdiction. Counsel has cited cases dealing entirely with the question totally unrelated to the question of State Court jurisdiction.

In no case has this Court ever held that a State Court has the right to assume jurisdiction on the basis of its State Right to Work Laws if the alleged violation would also constitute a violation of the National Labor Relations Act or if the activity is protected

by the National Labor Relations Act. On the contrary, in the case of *Farnsworth & Chambers, Inc., vs. Electrical Workers*, 353 U.S. 969, the Supreme Court of the United States expressly held to the contrary. The Tennessee Supreme Court, 229 S.W. 2d 8, held that the State Court had jurisdiction under the State Right to Work Laws. The Supreme Court of the United States reversed this decision in a per curiam opinion, saying:

> "The petition for writ of certiorari is granted and the judgment of the Court of Appeals of Tennessee is reversed. See *Weber vs. Anheuser-Busch, Inc.*, 348 U.S. 468; *General Drivers, etc. vs. American Tobacco Co., Inc.*, 348 U.S. 978."

The Kansas Supreme Court in the case of *Asphalt Paving Company vs. Teamsters*, 41 LRRM, 2194, and the North Carolina Supreme Court in the case of *Douglas Aircraft Company vs. IBEW*, 41 LRRM, 2594, refused to assume jurisdiction of cases involving the State Right To Work Law on the basis of the *Farnsworth & Chambers* case.

THERE IS NO REASONABLE BASIS IN THE EVIDENCE FOR A FINDING THAT THE GEORGIA RIGHT TO WORK LAWS HAVE BEEN VIOLATED

In the case at bar the Supreme Court of the State of Georgia expressly holds (Tr. 43, 44) that peaceful picketing is not unlawful unless for an unlawful pur-

pose and then holds that the picketing was peaceful. It then holds that the trial judge was authorized to find from the evidence that the statement upon the picket sign that the petitioners were not paying wages conforming with those paid on similar types of work in the Atlanta area was true.

The Court then finds that Curry has no labor dispute with their employees and Petitioner in Certiorari is not representing employees of Curry. The Court seems at this point to be basing its decision on the fact that stranger picketing is involved and seems to be holding that the controversy involves wages.[2]

The Court, however, then states that "the facts of the preesnt case are similar to those in *Powers vs. Courson*, 213 Ga. 20, 96 S.E. 2d 577," and quotes from the *Powers* case in which case "the picket was placed on the job for the purpose of forcing Powers to employ only union labor".

This is not a clear ruling that the Right to Work Laws are violated, although it is quite possible to infer that the Court is so holding.

If the Georgia Supreme Court did so hold thereby overruling the Trial Court, which apparently held to the contrary, the Supreme Court of Georgia saying

[2] See very recent case of Waxman vs. Commonwealth of Virginia, 51 LRRM, 2221, (U.S. Citation not yet available) reversing 203 Va. 257, 123 S.E. 2d 381.

said laws are violated does not make them violated unless the evidence so reflects.

In the case of *Plumbers and Steamfitters vs. Graham*, 345 U.S. 192, 73 Sup. Ct. 585, this Court said:

> "In a case of this kind we are justified in searching the record to determine whether the critical finding by the State Courts had a reasonable basis in the evidence."

In the case of *Milkwagon Drivers Union vs. Meadowmoor Dairies*, 312 U.S. 287, this Court said:

> "Still it is of prime importance that no Constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of facts screening reality. That is why this Court has the ultimate power to search the records of the State Courts where a claim of unconstitutionality is effectively made."

It is contended that the Right To Work Law was violated because of the following facts:

On February 14, 1961, a meeting was held by Defendant in Certiorari with the Business Agents and Representatives of various Unions, as well as with Mr. James Moore, Representative of the Atlanta Building Trades Council. The testimony of Defendant in Certiorari was to the effect that at this meeting Mr. Moore and several unidentified persons represent-

ing several unidentified Unions stated that Union members must be employed on the project, and that they intended to see that this was done. The only evidence connecting the Petitioner in Certiorari to this conference was the statement in the affidavit of S. J. Curry, pages 8 and 9 of the transcript of the evidence, that "On or about February 14, 1961, I came to Atlanta, Georgia, to meet with representatives of various Unions in this area, including a representative of Construction and General Laborers Union No. 438". The only evidence with reference to who attended the meeting was the statement of Mr. Curry that "there was some 15 to 18 Business Agents and Representatives of various Unions present at this meeting. In addition there was a representative of the Building Trades Council of Atlanta, who I remember to be a Mr. Moore, and he appeared to be the spokesman for the group."

It may possibly be assumed from the above that a Representative of Construction and General Laborers Union No. 438, Petitioner in Certiorari, was present at this meeting, and it may possibly be assumed that such Representative was such Representative as had the authority to bind the Petitioner, and it may possibly be assumed that there was an obligation upon Petitioner in Certiorari to repudiate said statements. It is submitted that even if all of said assumptions are granted there can be no question from the evidence that the Right to Work Law was not in any way involved in the picketing for the following reasons:

There is not a scintilla of evidence in the record that any action was taken following said meeting to require the employment of Union labor. The picketing did not result until six months thereafter. The evidence is undisputed that it came to the attention of the Petitioner that the Defendant in Certiorari was violating its contract with the City of Atlanta in the payment of wages to its employees. It is undisputed that the company had executed a contract with the City of Atlanta containing the following language: "Wages will conform with those being paid on similar types of work in the Atlanta area". It was undisputed that the Defendant was not paying the wages conforming with those being paid on similar types of work in the Atlanta area but was paying only a little over one-half of said rate, thereby violating its contract with the City of Atlanta. (Tr. pages 19, 20, 23, 24, 26, 27, 28, 29).

It is undisputed and clearly established in the record that the Petitioner held numerous conferences with the City Attorney of the City of Atlanta and other Officials of the City of Atlanta throughout said six months period of time in which it sought to prevail upon the City to enforce its contract and to require the payment of the prevailing wage in the area. It is undisputed that it was made plain to the City that the Union had no complaint concerning the persons employed, but was merely insisting upon the upholding of the wage scale. It is undisputed that the Petitioner finally carried the matter before the City Board of Aldermen, which Board declined to do any-

thing about the matter, stating in its written minutes that there was nothing that the City could do to require Curry to raise its wage rates. There was not the slightest intimation in the record that at this hearing before the Board of Aldermen the Petitioner made the slightest request that Union people be hired and non-Union people fired. There is absolutely no evidence in the record that at any time during this six months interval immediately preceding the picketing the Union even intimated to anyone that it desired that only Union men be employed on the job. On the other hand, it is undisputed that throughout all of said time the Petitioner tried in every way at its command to prevail upon the City of Atlanta to enforce its contract as to wages. It was only after the action of the City Board of Aldermen, which exhausted the efforts of the Petitioner to prevail upon the City to take action to protect its interests as set forth in the contract, that the Petitioner erected a picket sign stating: "S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction and General Laborers' Union 438, AFL-CIO". (Tr. pages 3, 4, 5, 20, 21, 22, 25).

All of the facts relating to the conduct of the Petitioner between said meeting of February 14, 1961, and the date the picket line was erected on August 10, 1961, are totally and completely undisputed. As long as there was any possibility that the City would enforce its contract and require the Defendant in Cer-

tiorari to pay the wages required by the contract Petitioner in Certiorari refrained from engaging in any picketing action. Upon being rebuffed by the City Board of Aldermen, which stated that it could not require the City to raise the wage scale, there was no further avenue of persuasion to the City of Atlanta which was open. It was only after the Board of Aldermen had closed the door to any further efforts on behalf of Petitioner in Certiorari to have the wage scale conform to Defendant in Certiorari's contractual obligations that Petitioner in Certiorari resorted to its only remaining recourse, which was to publicize the facts relating to this breach of contract by means of legal, peaceful picketing. Petitioner showed an unusual amount of patience and resorted to picketing only as a last resort after all other possibilities had been completely exhausted over the course of many months.

STRANGER PICKETING DID NOT JUSTIFY ASSUMPTION OF JURISDICTION BY STATE COURT

There is no question of whether Petitioner in Certiorari was engaged in protected concerted activity within the meaning of Section 7 of the National Labor Relations Act by engaging in this picketing. As the Court is well aware, and as is established without contradiction by the evidence in this case, contracts in the construction industry are secured by means of competitive bids. The Defendant in Certiorari was enabled to present the lowest bid and se-

cure the contract because of the fact that it did not pay the wages paid by competitive contractors within the area. By failing to pay the prevailing wages Defendant in Certiorari was undercutting and destroying the entire wage structure within the area. The competing companies were and are faced with the choice of either losing competitive bids and being forced out of business or reducing their wage scales to the level of the competition of Defendant so as to compete on an even basis with Defendant with the eventual result that the entire wage structure and standard of living for the persons represented by the Petitioner in Certiorari will be completely destroyed. (Tr. 21, 22, 25). Those represented by Petitioner in Certiorari certainly have a right to engage in concerted activity for the purpose of publicizing this situation. This is particularly true where, as here, the terms of a contract with the City of Atlanta, which terms were incorporated in the contract for the purpose of preventing the above stated result, are being flagrantly violated.

In the *American Federation of Labor vs. Swing case*, 312 U.S. 321, the Court said:

> "A State cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competion between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry

has become a commonplace. *American Foundries vs. Tri-City Council*, 257 U.S. 184, 209. The right of free communication cannot, therefore, be mutiliated by denying it to workers in a dispute with an employer, even though they are not in his employ".

The National Labor Relations Board, in the case of *Plumbers and Pipefitters Union (Keith Riggs Plumbing and Heating Contractor)*, 50 LRRM, 1313, 137 NLRB No. 121, had before it a case for decision in which picketing had been engaged in to publicize a non-union employer's substandard wages and working conditions. The Board held:

"A labor union normally seeks to organize the unorganized and to negotiate collective bargaining contracts with employers, but also has a legitimate interest apart from organization or recognition that employers meet prevailing wage scales and employee benefits or otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. Indeed the importance of maintaining area standards as a matter of public as well as Union interest was long ago endorsed by Congress by its enactment of the Davis-Bacon Act (40 U.S. Code, Sec. 273-A, etc.) relating to public contracts. It has application, of course, whether or not employees of public contractors are organized or have a collective bargaining contract."

In the case of *Weber vs. Anheuser-Busch*, 348 U.S. 468, the Supreme Court held that the States must decline jurisdiction where conduct is protected by Section 7 of the National Labor Relations Act just as where it is prohibited by Section 8. This position was reiterated in the *Garmon* and *Garner* cases.

It is our insistence that no law has been violated. However, if the actions of the Petitioner are coercive and seek to force the employees to join the Union they are a violation of Section 8(b)(2) and 8(b)(7) of the National Labor Relations Act.

The case of *Hotel Employees vs. Sax*, 358 U.S. 270, involved organizational picketing.

The case of *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236, was one where the Union sought to compel the Company to execute a union shop contract when they did not represent the employees, and thereby to force the employees into the Union.

In the case of *Garner vs. Teamsters*, 346 U.S. 485, the Union was picketing for the purpose of inducing employees to join the Union.

In the case of *Meatcutters vs. Fairlawn Meats, Inc.*, 353 U.S. 20, there was involved an attempt by Union not representing the majority of its employees to compel an employer to force his employees into the Union.[3]

[3] See very recent case of Waxman vs. Commonwealth of Virginia, 51 LRRM. 2221. (U.S. Citation not yet available) reversing 203 Va. 257, 123 S.E. 2d 381.

All of said cases involved what is commonly known as "stranger picketing" even as is true in the case at bar; and in all of said cases the Supreme Court of the United States held that the issue had been pre-empted.

Not only is the State Court deprived of jurisdiction if it is established that the matter comes within the purview of the National Labor Relations Board but this Court has held that the State Court is deprived of jurisdiction if the subject matter of the case is even arguably protected or in violation of the National Labor Relations Act.

In the case of *San Diego Building Trades Council, etc. vs. Garmon*, 359 U.S. 239, 79 Sup. Ct. 773, the Supreme Court of the United States held:

> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, e.g., Garner v. Teamsters, etc. Union, 346 U.S. 485, especially at pages 489-491, 74 S.Ct. 161, at pages 165-166, 98 L.Ed.

228; Weber v. Anheuser-Busch, Inc., 348 U.S. 468; 75 S.Ct. 480, 99 L.Ed. 546.

". . . It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is *arguably* subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (Emphasis supplied.)

It is, therefore, plain that the Courts of the State of Georgia have assumed jurisdiction of a preempted field, and the purpose of Congress in enacting the National Labor Relations Act to secure uniformity in labor relations involving interstate commerce is being utterly and completely defeated.

Respectfully submitted,

POOLE, PEARCE & HALL

BY: Edwin Pearce

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CERTIFICATE OF SERVICE

I hereby certify that I have served five copies of the above Brief In Reply To Brief Of Defendant In Certiorari by mailing five copies of same, by registered mail, to Robert Langstaff, Attorney at Law, P. O. Box 747, Albany, Georgia, Attorney for Respondents.

This 1st day of November, 1962.

John S. Patton.